Supreme Court, U.S.
MOTION FILED
NOV 3 - 2008
William K. Suter,
Clerk

(4)

NO. 08-440

IN THE

Supreme Court of the United States

ELEANOR BODKIN, ET AL.,

Petitioners,

v.

COOK INLET REGION, INC.,

Respondent.

On Petition for a Writ of Certiorari to
the Supreme Court of Alaska

BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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Amicus Curiae

3 November 2008

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* [1]

William D. English, moves for leave to file the attached brief *amicus curiae* that is set out below. This *amicus curiae* brief in support of the petition is submitted pursuant to Supreme Court Rule 37.

Counsel for petitioner has consented to the filing of this brief and his consent letter will be lodged with the Clerk of the Court. Although this Amicus gave timely advance (ten days before the deadline for filing this brief) notice to Counsel for the respondent, Cook Inlet Region, Inc., [CIRI] the respondent, has not consented to the filing of this brief. Therefore, the *amicus* moves pursuant to Rule 37.2(b) for leave to file this *amicus curiae* brief.

The interest of the amicus stems from his participation as an attorney in litigation involving corporate governance issues of Alaska Native Corporations. Counsel is an Alaska attorney in good standing and also is a member of the Supreme Court Bar.

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or part, and no person or entity other the *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Amicus supports petitioners' argument that the Supreme Court of Alaska denied the petitioners' appeal in error and that a Writ of Certiorari should be granted.

SUMMARY OF ARGUMENT

The combination of highly politicized Alaska Native Corporations plus lack of market and regulatory monitoring of corporate performance plus the permissive statutes of the Alaska Native Claims Settlement Act of 1971 [ANCSA] creates the conditions where discriminatory distributions can be diverted to a favored few. The Alaska Supreme Court erred in affirming the Alaska Superior Court decision.

ARGUMENT

Alaska Native Corporations are different from typical business corporations in many respects. One example of this difference that is pertinent to this brief is the treatment of dividends. Under traditional corporate governance principles, dividends among shareholders of the same class of stock must be distributed on a pro-rata basis. Discriminatory dividends are prohibited. The larger corporate governance principle that is being served by prohibiting discriminatory dividends is that a corporation is to be run to benefit all shareholders.

Despite the corporate form, Alaska Native Corporations perform a lot of non-corporate functions mostly in the nature of health, education, and elder benefits. The corporate distributions which serve the above social service functions target specific shareholders to the exclusion of other shareholders. The dual function of for profit enterprise simultaneously coexisting with delivery of social services gives Alaska Native Corporations a hybrid nature.

The Alaska Native [Land] Claims Settlement Act of 1971 ("ANCSA") authorizes the departure from traditional corporate law principles and also preempts any inconsistent state law. For example, elder benefits may be distributed to a shareholder aged 65 or older, but not to all the other shareholders under the age of 65 under 43 U.S.C. § 1606(r).

This example seems laudable and well within the statutory authorizations by ANCSA. The example is also very close to the facts involving the dispute in *Bodkin v. Cook Inlet Region, Inc.* which has a factual difference of importance. In *Bodkin* the elder benefit was paid to shareholders over the age of 65 and, in addition, only to original shareholders over the age of 65. This differentiation in shareholders between original shareholders over 65 and all shareholders over 65 is cause for concern. Amicus sees the potential for discriminatory abuse in dispensing corporate largesse to favored shareholders. If the petitioners' request for a Writ of Certiorari is not granted, then all Alaska Native Corporations could potentially adopt practices in the name of ANCSA which redistribute the corporate pie.

The boundaries of acceptable distribution should be made clear by the Court. The potential for abuse should be minimized by the Court.

The above assertion that there is a potential for abuse is supported by two arguments. (1) Alaska Native Corporations like Cook Inlet Region, Inc. [CIRI] are characterized by a lack of monitoring and oversight, and (2) the corporate structure is characterized by the unusual corporate restriction that the stock cannot be sold or transferred. This unusual feature results in a highly politicized corporation.

Alaska Native Corporation stock is not publicly traded in any market. There is no Securities and Exchange Commission oversight, and there are no exchange rules like the New York Stock Exchange rules to obey. The corporate information that is summarized in stock prices on an open market is nonexistent. Equity analysts do not analyze the stock, and the press generally does not report corporate performance or the future prospects of the corporation to stockholders. The market forces which regulate publicly traded companies and monitor managerial performance do not have any effect on the managerial performance in Alaska Native Corporations. Important regulatory legislation like the Sarbanes–Oxley Act of 2002 do not apply, despite its useful requirements that could improve Native corporate performance, like the requirement to have independent directors on the audit committee. The managers have a freedom, untethered to market or regulatory discipline and under the permissive

ANCSA statutes, to benefit a narrowly defined group of shareholders and to put corporate assets beyond the reach of all the shareholders. The potential for abuse flourishes in such environments.

Commentators have stated that Alaska Native Corporations have become highly politicized due to the unusual corporate feature of non-transferability of shares.[2] In sum, native shareholders cannot opt out of the corporation by selling their shares. They then use predictable strategies like pooling voting resources in alliances to demand higher dividends, in lieu of selling their shares. If the shareholders could sell their shares, normal corporate theory would predict that the shares would be purchased by shareholders who would demand better corporate performance. Blocks of large shares would be accumulated by individuals or groups that could have leverage over an underperforming management or board. Because each shareholder was issued 100 shares of stock at the inception of the Alaska Native corporation in 1972, the voting power was diffused over many different individuals. One share, one vote in essence became one person, one vote. Political style campaigns became the norm as corporate policy and board elections became hotly contested. Groups

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[2] *See* Jonathan Karpoff and Edward Rice, *Organization Form, Share Transferability, and Firm Performance: Evidence from ANCSA Corporations,* 24 J. FIN. ECON. 69, 99 (1989) (arguing that due to transferability restrictions, shareholders wage political-style campaigns to gain support of other shareholders and to influence management).

of individuals divided into opposing sides to control the corporation. Management and the ruling board majority have used the corporate assets to reward loyalty with consulting contracts, advisory fees, seats on multiple boards and subsidiaries, and corporation contracts to close relatives.

If one adds the potential for abuse due to lack of monitoring to a highly politicized corporate environment, the conditions exist for a slippery slope of increasing corporate largesse to a favored few shareholders, management, or directors. A bright line should be drawn by the Court as to what is clearly discriminatory and what is permitted. CIRI has violated the line and violated the law.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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3 November 2008